

STAFFORD COUNTY BOARD OF ZONING APPEALS MINUTES

August 26, 2008

The regular meeting of the Stafford County Board of Zoning Appeals (BZA) on Tuesday, August 26, 2008 was called to order with the determination of a quorum at 7:01 p.m. by Chairman Ernest Ackermann in the Board of Supervisors Chambers, in the Stafford County Government Center. Mr. Ackermann introduced the Board members and staff and explained to the public present, the purpose, function and process of the Board of Zoning Appeals. He asked the members of the public who planned to speak at this meeting to please stand and raise their right hand, swearing or affirming to tell the truth.

Mr. Ackermann stated the Bylaws of this Board state the applicant would be allowed up to ten minutes to state their case, the other speakers would be allowed three minutes to testify, and the applicant would be allowed three minutes for rebuttal.

Members Present: Ernest Ackermann, Larry Ingalls Cecelia Kirkman, John Overbey and Robert Gibbons

Members Absent: Steven Beauch

Staff Present: Rachel Hudson, Zoning Administrator
Amber Forestier, Environmental Planner
Stacie Stinnette, Recording Secretary

Mr. Ackermann asked if there were any changes or additions to the advertised agenda.

Ms. Hudson stated no.

Mr. Ackermann asked if the any Board member would like to make a declaration or any statement concerning any cases to be heard before the Board at this meeting.

Mr. Ingalls stated the firm that prepared the Major Water Quality Impact Assessment, Williamsburg Environmental Group, Inc., had done work for the same firm that Mr. Ingalls was employed by, however, he did not work with the same clients and had not worked together on this case and would be able to render a decision for case V08-3/2800537. He stated he did speak with a member of staff prior to the meeting.

PUBLIC HEARINGS

1. **V08-3/2800537 - STAFFORD RESIDENTIAL I, LLC** - Request a Variance of Stafford County Code, Section 28-62(f)(1)(c) "Development Conditions" for a new use subject to the provisions of Section 28-62(g)(2)f.2.(a) on portions of Assessor's Parcels 44-106C & 44-107; and for a new use subject to the provisions of Section 28-62(g)(2)a. on Assessor's Parcel 44-119M to grade and re-vegetate within the landward fifty (50) feet of the one hundred (100) foot Critical Resource Protection Area buffer. The property is zoned LC, Life Care/Retirement, located on International Parkway.

Ms. Hudson read the staff report and listed the items the Board received in their package.

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Amber Forestier, Stafford County Environmental Planner, read the staff report and reviewed in detail the items the Board received in their package. She reported to the Board the history concerning Ordinance O08-03 and the reclassification of the applicant's property. She stated the applicants were requesting a Variance of Stafford County Code Section 28-62(f)(1)(c) "Development Conditions" for a new use subject to the provisions of section 28-62(g)(2)f.2.(a) on portions of Assessor's Parcels 44-106C and 44-107, and for a new use subject to the provisions of section 28-62(g)(2)a. on Assessor's Parcel 44-119M to grade and re-vegetate within the landward fifty (50) feet of the one hundred (100) foot Critical Resource Protection Area (CRPA) buffer. She stated Stafford Nursing Home and Retirement Community project area encompassed 22.67 acres and was located on International Parkway. She gave a detailed description of the property and listed all areas that were affected by Critical Resource Protection Area (CRPA). She stated to construct the project as shown on the GDP, very tall-engineered retaining walls would be necessary and would add an estimated \$1.3 million and be a hazard for this type of development. She stated the applicants propose clearing and grading 1.71 acres within the landward fifty (50) feet of the CRPA on both streams, to allow for the construction of the proposed nursing and retirement community on the site and the disturbed area within the CRPA would be replanted per the standards set by the Department of Chesapeake Bay Local Assistance. She stated a previously disturbed additional area consisting of 0.22 acres within the CRPA would also be replanted. She stated a plat showing "Dedication for Public Street and Various Easements and subdivision of a portion of Stafford Industrial Park" was recorded on December 12, 2001 and a Conservation Easement encompasses the CRPA on this plat. Per the attached e-mail from the County Attorney's office, this conservation easement does not prohibit the proposed disturbance of the Chesapeake Bay CRPAs if the variance application is approved by the Board of Zoning Appeals. She state Parcels 44-106C and 44-107 were both platted prior to October 1, 1989, the date that Stafford County incorporated the Chesapeake Bay Overlay District into the Zoning Ordinance. These parcels would qualify for an Administrative Waiver per Code Section 28-62(f)(1)(c) "Development Conditions" for a new use subject to the provisions of section 28-62(g)(2)f.2.(a) **if** certain requirements were met. The grading proposed within the landward 50 feet of the CRPA on these parcels does not meet the requirement in the code that states: "Encroachments into the buffer areas shall be the minimum necessary to achieve a reasonable buildable area for a principal structure and necessary utilities". The grading within the CRPA is proposed for the construction of multiple buildings, not a single principal structure. Guidance on "Buffer Area Encroachments" from the Department of Chesapeake Bay Local Assistance specifically states that the requirement that encroachments only be allowed for a single principal structure also applies to commercial properties. Therefore, the applicants had to apply for a variance from these requirements as an Administrative Waiver could not be granted. She stated Assessor's Parcel 44-119M was platted in May, 2006. Any parcel which was platted after December 2, 2003 must maintain a full 100 foot CRPA buffer, unless the activity is approved by the administrator under Section 28-62 (f)(1) or an exempt activity as described in Section 28-62(k). The grading to attain adequate buildable area for the proposed development does not fall into either sub-section of the code and therefore the applicants have applied for a variance. She stated if the Board was inclined to approve the request, staff would recommend the following conditions: **1)** Applicants shall submit a five (5) year Maintenance Plan for the replanted areas within the CRPA. **2)** Prior to any clearing and grading in the CRPA, orange fencing shall be placed along all areas within the CRPA which are to remain undisturbed. **3)** The CRPA shall be replanted and approved by an Environmental Planner prior to occupancy permits being issued for the first building. **4)** The final landscaping plan shall be designed by a licensed landscape architect and shall be included as part of the Storm Water Management Concept Plan and the Major Site Plan, when submitted.

Mr. Gibbons asked for the dates the parcels were platted and the date the Ordinance was changes.

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Mrs. Forestier stated parcels 44-106C and 44-107 were both platted prior to October 1, 1989, the date that Stafford County incorporated the Chesapeake Bay Overlay District into the Zoning Ordinance.

Mr. Gibbons asked when the land was platted originally.

Mrs. Forestier stated 106C was platted in January of 1989 and 107 was platted in 1938.

Mr. Gibbons asked if January 1989 was before the Ordinance was adopted.

Mrs. Forestier stated yes.

Ms. Kirkman asked if this covered three parcels.

Mrs. Forestier stated there were three parcels associated with the rezoning.

Ms. Kirkman asked how many parcels were included in this Variance request.

Mrs. Forestier stated the streams were on two of the parcels but the parcel lines were going to be erased to consolidate the parcels and suggested the entire parcel be included.

Mr. Gibbons asked if three lots were combined.

Mrs. Forestier stated yes.

Bruce Hedrick, Smith Packett, stated his company had been doing this for 25 years and had done 150 similar projects in Virginia. He stated Smith Packett currently had four types of developments in other parts of the state. He stated the success of the company and the projects that were completed and built on providing affordable healthcare and services. He provided photos to show the level of services provided and provided information of who would be served. He stated the average age on campus was 80 to 82 years old and most of the residents would not drive. He stated 75 percent of residents come from within 8 – 10 miles, 70% of the nursing home residents are indigent, one in ten people aged 65 to 74 years had serious mobility issues and a top reason for selecting senior housing is for safety reasons. He discussed in detail the need for a full continuum retirement community in Stafford County and stated the growing elderly needs in Stafford County's 75+ population would increase 30 percent over the next five years. He stated in January 2005, Smith/Packett identified a need in Fredericksburg, Stafford, Prince George, Spotsylvania and Caroline. He stated Smith/Packett acquired Brooke Nursing Home and supported legislation to allow the issuance of a 90 bed Certificate of Public Need (COPN). He stated there was a strong need and support in Stafford County with over 150 letters and signatures of community support and a strong need for 338 beds. He stated March 2008, Stafford County Board of Supervisors approved the Life Care (LC) Zoning District for the 22 acre site on Berea Church Road. He stated LC allows for the continuing care of elderly, by providing transitional housing; the campus must include all levels of care. He showed an aerial view of the site and conceptual site plan. He provided a proffer overview and stated there was over \$2 million in cash proffers and significant road improvements on Berea Church Road as part of the site plan. He listed the amenities as shown in the proffers. He stated Smith/Packett reasons for requesting a Variance was that development of the site pursuant to the proffered GDP required extensive retaining walls that were not reasonably anticipated at the time of rezoning. He stated the request was to develop in the landward portion of the critical resource protection area (CRPA). He stated the application was consistent with the public interest and the literal enforcement of the provisions of the Chesapeake Bay Act 28-62 (f) and 28-62 (g)(2) will

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result in unnecessary hardship. He provided in detail the reason the Board should support the request for a Variance and provided an elevation of the retaining wall as requested in the staff report. He stated the COPN required the applicant to commence construction by May 2009, redesigning campus to alter the proffered GDP necessitates an amendment to its rezoning application and further delays would jeopardize and potentially cause the applicant to lose the COPN. If the COPN was lost, the project would not meet the LC zoning requirements and the site would not be developable for the intended use, and loss of the COPN would adversely impact the County and its residents in need of the nursing home and retirement related services proposed by the project.

Jeff Hancock, Williamsburg, Environmental Group, Inc., stated he was working on behalf of the applicant and had prepared the Major Water Quality Impact Assessment (WQIA). He stated they were proposing mitigation measures to improve the current CRPA, the proposed grading into the buffer would be re-vegetated and they were not looking to eliminate any of the buffer. He stated portions of the buffer previously disturbed were proposed to be restored as part of the water quality assessment and part of the mitigation. He stated the proposed development plan for the site that was requested under the Variance, would result in 1.7 acres of temporary encroachments in the landward 50 feet of the 100 foot buffer. He stated 1.93 acres of buffer would be restored by planting with native trees and shrubs at a density of 654 stems per acre per the Chesapeake Bay local assistance guidance on buffer restoration. He stated there was work completed to avoid and minimize the encroachments. The proposed grading into the buffer would be re-vegetated to serve as a functional riparian buffer. He stated there were no proposed impacts to the CRPA except the buffer; and there would be no impacts to wetlands and streams. He stated the request for encroachment into the landward portion would only be for grading and re-vegetation, no impervious surfaces were proposed and the building footprints were adjusted to avoid the buffer. He stated structured parking would be provided to accommodate parking requirements while avoiding the buffer and minimizing site impervious area. He stated the encroachment in the RPA would result in a reduction of the retaining walls required by the project from 53,000 square feet to 23,000 square feet and provided the proposed wall measurements.

Mr. Ingalls stated the need expressed by the applicant had little to do with the request for a Variance. He stated to request a Variance the situation could not be self imposed. He asked if the applicant had been doing this for 25 years, could he explain why this request was not self imposed.

Mr. Hedrick stated the need for the retaining walls was not realized early on in the project.

Mr. Ingalls stated he did not understand why the applicant was not responsible for the request for a Variance and asked who was responsible. He stated there were no impacts shown on the GDP when the rezoning was heard by the Planning Commission.

Mr. Hedrick stated going through the Life Care text amendment process noted some unusual circumstances for the County, the applicant was not able to do the rezoning concurrent with the site plan process. He stated if the process was done concurrently they would have been able to discover some of the site perimeters that restrict development. He stated the applicants hands were tied during the rezoning process to work on conceptals versus the specifics of the site plan.

Mr. Ingalls stated someone with 25 years of experience would have looked at the problem long before now. He stated the applicant indicated they were not able to make changes because the GDP was proffered and the staff report indicated the applicant would be able to change a few things based on site plan requirements and county requirements.

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Mr. Hedrick stated he felt there was a plan attainable and could change the GDP, which would require going through the same process started in 2006. He stated the COPN required the applicant to have construction started by May or June 2009. He stated he did not believe the applicant could restart the entire process and move the building enough to take care of the retaining wall issues that were identified. He stated Stafford County had a unique opportunity to build a new nursing home, which could be jeopardized if construction was not started in May 2009.

Mr. Ingalls stated there had been changes that were not reflected on the GDP and to state the applicant could not change the GDP, which had already shown changes.

Mr. Hedrick stated those changes were reflective of comments received by staff.

Mr. Ingalls stated there was mention of the 1.7 RPA disturbance on the site and asked for the total area of the RPA on the site.

Mr. Hancock stated the applicant was asked by staff to separate those encroachments that were permitted or allowed under administrative process including water dependent facilities, private roads and roads. He stated the total disturbance was 2.88 acres of a total of 3.7 acres of RPA. He stated re-vegetation to riparian buffers was proposed of 2.04 acres and the area that could not be re-vegetated was a sanitary sewer easement, which utilities would not allow the planting of trees and shrubs.

Mr. Ackermann asked if the facility would be available to Medicaid patients.

Mr. Hedrick stated yes.

Mr. Ackermann asked how the applicant would make up for the loss.

Mr. Hedrick stated those that pay help to subsidize for those who cannot pay. Private pay and Medicare are the forms of payment that make up the difference.

Mr. Ackermann asked the number of Medicaid patients.

Mr. Hedrick stated that number of Medicaid patients was typically 70 percent.

Mr. Ackermann asked if the rent would be capped or how they would be adjusted or time.

Mr. Hedrick stated residents would be on a month to month lease and the fees are based on the services received by the residents. He stated it would allow the residents to select the services needed.

Mr. Ackermann asked if the fees were regulated by the state.

Mr. Hedrick stated no.

Ms. Kirkman stated as a member of the Planning Commission, she did review the rezoning proposal and the concurrent amendment to the Comprehensive Plan.

Mr. Gibbons asked if they were companion.

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Ms. Kirkman stated yes, they were done at the same time and they often would be if there was a project not consistent with the Comprehensive Plan. She stated she was surprised that the encroachment shown on the GDP at that time showed an encroachment for a gate and was surprised to see such an extensive request before the BZA tonight. She stated the applicant discussed the fees, leases and services and the number of Medicaid and indigent patients; she asked Mr. Hedrick how many of the renters would be indigent.

Mr. Hedrick stated none; that was private pay.

Ms. Kirkman asked how many of the Medicaid and Nursing Home residents did not reside in the facility prior to coming to the Nursing Home.

Mr. Hedrick stated direct admission was approximately 15 to 20 percent.

Ms. Kirkman stated on the COPN, one of the adverse effects of not receiving the Variance might be that the applicant may lose the COPN. She state on the COPN there were residents disrupted at Brook Nursing Home and the Department of Public Health put specific time limits on when construction needed to start and those time limits were not met originally, she asked if that was correct.

Mr. Hedrick stated that was correct.

Ms. Kirkman asked the applicant what happened since the COPN was set to expire some time ago.

Mr. Hedrick stated he requested a significant change to move to this site to provide a full campus model that would provide for an affordable model.

Ms. Kirkman stated the significant change meant the applicant requested an extension of the COPN and asked the applicant that it could be possible to get another extension on the COPN date.

Mr. Hedrick stated that was not correct, it was up to the State to decide whether they can or cannot approve a significant change.

Ms. Kirkman stated it was possible to request an extension since the applicant had already done that once.

Mr. Hedrick stated since one request for an extension was granted, it would be difficult to obtain other requests for an extension.

Ms. Kirkman asked if the applicant had requested one COPN extension.

Mr. Hedrick stated yes.

Ms. Kirkman asked if it was possible to apply and receive another extension.

Mr. Hedrick stated yes, the applicant could apply.

Ms. Kirkman stated in terms of whether this was self imposed, she asked the applicant if they chose the property for this project.

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Mr. Hedrick stated yes.

Mr. Kirkman asked if the applicant choose to apply for the rezoning.

Mr. Hedrick stated yes.

Ms. Kirkman asked the applicant if the proffers, they stated were limiting them, were they voluntary.

Mr. Hedrick stated it was a collaborative effort between staff and the approval process; one of the hardships the applicant had was they could not move the nursing home from south and bisecting perennial stream.

Ms. Kirkman asked if the applicant's understanding was that proffers were voluntary or if the applicant was coerced into the proffers.

Mr. Hedrick stated in order to have the project rezoned the applicant had to offer proffers.

Ms. Kirkman asked if the applicant voluntarily entered into the agreement.

Mr. Hedrick stated yes.

Ms. Kirkman stated another concern was the applicant citing the retaining walls and showed areas without retaining walls that would have a slope of 3 to 1 ratio and asked if that was correct.

Mr. Hedrick stated yes.

Ms. Kirkman asked if that was a ratio that most patients could navigate on there own.

Mr. Hedrick stated no, typically there would be fencing as shown on the elevation.

Ms. Kirkman asked if there would still be a use for the property if the Variance was not granted.

Mr. Hedrick stated yes, but would not reach the affordable level originally proposed.

Mr. Gibbons asked how much land disturbance was on the entire property.

Mr. Hedrick stated 16.4 acres of 22 acres total.

Mr. Gibbons stated that left 6 acres of the total site to negotiate with and asked if there was any other acreage available.

Mr. Hedrick stated no.

Bill Pyle, Greenhorne and O'Mara, stated the 16.4 acres was approximately the limits of disturbance as shown on the site plan in process of preparing. He stated that would also include road improvements.

Mr. Gibbons asked what portion of the 22 acres were agreed to include in the expanded buffer.

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Mr. Hancock stated the applicant would replant 1.93 acres and an additional 0.23 acres outside of the RPA buffer that could be added as additional buffer.

Mr. Gibbons stated this case was more of an economic issue then a hardship.

Mr. Hedrick stated it was a hardship and if the nursing home was moved, the applicant would have to go through the entire process again.

Mr. Gibbons stated the applicant stated if the Variance was not approved the applicant could still use the property.

Mr. Hedrick stated yes.

Mr. Ingalls asked of the 50 foot landward buffer the applicant disturbed 80 percent of that buffer.

Mr. Hancock stated that was a good approximation.

Mr. Ingalls stated his concern was tearing down 80 percent of the trees, grade and fill back in on a 3 to 1 slope, plant trees, shrubs and asked if that was better then leaving it alone.

Mr. Hancock stated it would be stabilized with ground cover, trees and shrubs. He stated there may be a period of time where there may be an increase in runoff but by stabilizing with a vegetative cover they could elimination erosion on the banks.

Mr. Ackermann opened the hearing for public comment.

Shawn Lawrence, 1201 Providence Drive, stated he was in support for the development of full continuum care to Stafford residents. He provided statics from the US Census Bureau regarding the older Virginians in need of assisted living care. He stated rising housing costs may affect seniors trying to live independently and there was a shortage of affordable rental housing and a need for housing that provided services. He stated he worked with the elderly and on many Boards and Commission that deal with planning district 16 and this project would be needed in Stafford County.

Michael Churwick, 209 Kent Avenue, stated he was a cardiologist who lived in Fredericksburg for 30 years. He stated he wanted to speak to echo Mr. Lawrence's comments but to discuss the need for this service to the County. He stated the location of the facility was the right place for the County and urged the Board to discuss the option to ensure the affordability in the County. He asked which was worse not having a Nursing Home facility for 25 years or to have a facility that no one could afford. He stated if medical care could be kept affordable then they have done their job but if more fees were added this would be something few people could afford.

Ruth Carlone, 300 Mount Olive Road, stated she was on the Planning Commission and this was not what the Commission approved. She stated there was already a concession to cross a perennial stream. She stated she could not see the undo hardship in putting in a wall and did not see where it would preclude building the facility. She stated she did not see moving the building as a hardship. She stated the County recognized the need for this facility and did not feel that a request for a COPN extension being denied. She requested that BZA deny this request.

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Patricia Kurpiel, 38 Dobe Point, stated she was requesting the Board to deny the request for a Variance. She stated as hardship was defined under the Code, the applicant did not prove there was a hardship. She stated the situation was self imposed and finds it incredible that this was not found during the rezoning and Comprehensive Plan process. She stated, in her opinion, it was not a hardship to build a wall that would be expensive and did not feel financial hardships counted. She stated a 3 to 1 slope would be dangerous and asked if a 4 foot wall would be safe. She asked the Board to deny the application.

Charlie Payne, Hershler Fleisher, stated he was the representative for the applicant. He asked how to evaluate whether this was a financial question or hardship question. He stated this was the only Life Care zoning in the County and came to the County with certain requirements. He stated one of the requirements was to make the facility as affordable as possible and stated he did not know any developer when proffering the GDP that would spend money to determine whether or not the correct topographic studies or environmental studies were done.

Mr. Gibbons stated he could not follow what the hardship was, he asked if the applicant was leaning toward the financial hardship and asked if there was a certain limit on the money spent.

Mr. Payne stated the ordinance required all three components working together, independent living, assisted living and the nursing home.

Mr. Gibbons asked what required the three and asked if the three functions would need to be contiguous on the site.

Mr. Payne stated the County Life Care Ordinance required it and the applicant had the GDP to make the project work. He stated part of the plan required the applicant to put the nursing home on the location placed and asked if the project had to be redone, where would the nursing home be placed. He stated there was no other place to locate the nursing home. He stated it was not easy to get a proffer amendment and would not be an easy process to get an extension on a COPN; the reason the COPN was extended was because the applicant moved the site. He stated the issue was whether the applicant lost reasonable use of the property.

Mr. Gibbons stated the applicant was stating the installation of the retaining wall would determine whether the project could continue or not, which was hard to comprehend.

Mr. Payne stated \$1.3 million in additional cost would be likely.

Mr. Gibbons asked for the total cost of the project.

Mr. Payne stated the applicant did not have those numbers yet.

Mr. Ackermann closed the hearing for public comment

Motion:

Mr. Overbey made a motion to deny the request for a Variance.

Ms. Kirkman seconded the motion.

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Mr. Overbey stated he motioned to deny the application because the reasons for the application seemed to be self imposed and the applicant did not meet the criteria for a variance. He stated a variance required that the property not be able to be used as it was zoned and as stated by the applicant the property could still be used for a facility, which may result in different designs but could still be used for the intended facility.

Ms. Kirkman stated she seconded the motion because in terms of a zoning variance did not believe that the applicant presented a hardship. She stated she believe specific to the requirements for a Variance for the Chesapeake Bay Act that by granting the Variance would provide the applicant special privileges that were denied to other property owners by the Chesapeake Bay Act in the Chesapeake Bay area, she felt this was self imposed and all actions were voluntary that lead the applicant to this point and did not find that the Variance was in harmony with the Chesapeake Bay Act. She did not see how disturbing 80 percent of the landward buffer comes close to keeping with the spirit of the Chesapeake Bay Act and for those reasons specific to the requirements for a Variance for the Chesapeake Bay Act supported the motion to deny the Variance.

Mr. Ingalls stated the use of the project, where it was located and what services would be provided was something the County needed. He stated he could not find a good reason to approve the request for a Variance and found that this was a weak case. He stated any zoned land in the county had some RPA and could possibly have the same issues and was surprised that a company with 25 years experience would not have evaluated what it would take to develop the property. He stated the proposed GDP showed proposed development close to the RPA and unfortunately, the GDP did not show any topography. He stated the applicant had plenty of time through the rezoning process to look at the property and review the topography of the land and come up with a solution to address the issue. He stated it was hard to vote to disturb 80 percent of the 50 foot landward buffer. He stated he supported the motion to deny the application for a Variance.

Vote:

The motion to deny the request for a Variance passed 5-0.

Mr. Ackermann – yes
Ms. Kirkman – yes
Mr. Ingalls – yes
Mr. Overbey – yes
Mr. Gibbons – yes
Mr. Levy – absent
Mr. Beauch – absent

UNFINISHED BUSINESS

2. **SE08-5/2800352 - UK KANG** - Requests a Special Exception per Stafford County Code, Section 28-35, Table 3.1, "District Uses & Standards", to allow the production of Soy Sauce/Paste as a Rural Home Business on Assessor's Parcel 59-56D. The property zoned A-1, Agricultural, located at 415 Forest Lane Road.

Mr. Ackermann stated there was an issue regarding case SE08-5/2800352 as it was not advertised and the adjacent property owners were not notified.

Ms. Hudson stated that was only if the public hearing was not opened.

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Ms. Kirkman stated the Board agreed at the last meeting that as far as the case got was staff reading the case.

Mr. Gibbons stated there could not be a staff report without opening the public hearing.

Ms. Hudson stated that was correct and unfortunately, the draft minutes did not indicate that in the motion; Mr. Overbey made a motion to defer this item to the September meeting.

Mr. Ackermann stated staff read the case and the Board had questions. He stated the draft minutes on page 1 of 12, stated public hearing.

Ms. Kirkman stated it did not state the public hearing was ever opened, for instance, the applicant never came forward to present their case. She stated her suggestion regarding the advertisement and notification of the adjacent property owners would need to be done correctly; if it was not done correctly that could be automatic grounds to overturn any decision made by the BZA. She stated if the Board had an attorney at the meeting that would be helpful.

Mr. Overbey stated according to the minutes the public hearing did not open; if the Board would look at the following case, it specifically stated the opening and closing of the public hearing. He stated he felt the Board was in a bind because the public hearing was never opened.

Ms. Kirkman stated on page 4 of 12, it read: Ms. Kirkman stated she would like to hold the public hearing to hear from the applicant to get all the issues out for discussion. She stated that made it clear that the Board did not open the public hearing.

Mr. Ingalls stated he would have thought that reading the case would have opened the public hearing.

Mr. Overbey stated in most meetings that the Chairman would make the statement that the public hearing was opened. He stated on the minutes for the next case heard at the previous meeting it specifically stated, Mr. Ackermann opened the public hearing for public comment.

Mr. Ingalls stated there was a difference with opening the hearing for public comment versus opening the public hearing. He stated there could be occasion when the Board could read the minutes, have enough questions, determine that the public meeting was opened, and not have public comment because of the case being deferred. He stated the case was properly advertised and the abutting properties were properly notified to be present at the meeting.

Ms. Kirkman stated if it was a public hearing then the Board would have to take public comment; the board did not take public comment or hear from the applicant at the July meeting. She stated the Board could not hold a public hearing and not hear from the public; people were present to speak and did not have an opportunity to speak. She stated the case was not properly advertised nor were the adjacent property owners notified of the public hearing tonight. She stated the Board would be committing a serious procedural error by moving forward with the case tonight.

Mr. Ingalls stated he would prefer to be cautious and if the majority would like to re-advertise then he would agree.

Mr. Ackermann agreed and asked staff to ensure that this case was re-advertised and the adjacent property owners notified.

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Ms. Kirkman asked staff to consult with the County Attorney's office to ensure the Board has the right process and all members were clear on the procedures.

Motion:

Mr. Gibbons made a motion to re-advertise this case for the September meeting and ensure proper notification to the adjacent property owners.

Mr. Overbey seconded the motion. He apologized to the applicant and the public that attended the meeting.

Mr. Ackermann, as the Chairman of the Board and on behalf of the Board, apologized to everyone who attended the meeting.

Ms. Kirkman stated it was important for all parties concerned that the Board follow the correct procedures.

Vote:

The motion to re-advertise this case for the September meeting and ensure proper notification to the adjacent property owners passed 5-0.

Mr. Ackermann – yes

Ms. Kirkman – yes

Mr. Ingalls – yes

Mr. Overbey – yes

Mr. Gibbons – yes

Mr. Levy – absent

Mr. Beauch – absent

REPORT BY ZONING ADMINISTRATOR

Ms. Hudson stated she did not have a report and would answer any questions. She stated she had not heard anything from the Circuit Court regarding the cases pending. She stated the staff had done everything that was required regarding the answer to the Writ.

Mr. Overbey stated the Board still did not have legal representation, which was denied by the Court.

Mr. Gibbons stated the Board had not received a date for the case to be set.

Ms. Hudson stated the Court would set the date.

Mr. Gibbons stated the party that filed a suit would set the date.

Mr. Ingalls asked how many outstanding court cases were there.

Mr. Ackermann stated there were two cases outstanding.

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Mr. Overbey stated Westlake and MJ Express.

Mr. Ackermann asked what the cases were for the September Meeting.

Ms. Hudson stated there were two appeals and two special exceptions.

Mr. Ackermann stated there was a discussion regarding automatic scheduling of the appeals to be heard by the BZA. He stated there was a motion to have staff set the dates for appeals to come before the BZA.

Ms. Kirkman stated the Board made the decision that appeals would automatically be scheduled by staff for the second meeting after the filing of the appeal.

ADOPTION OF MINUTES

Ms. Kirkman stated she would abstain from voting because she did not have time to review the minutes.

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Motion:

Mr. Overbey made a motion to adopt the May 27, 2008 minutes as presented.

Mr. Gibbons seconded the motion.

Ms. Kirkman stated she remembered these minutes being discussed at the last meeting and on page 6 of 13, requested staff to list all the reasons given in opposition of the motion made. She stated the reasons by the Board for supporting or opposing a motion was the most important part of the record.

Ms. Kirkman withdrew her abstention.

Vote:

The motion to approve the May 27, 2008 minutes as presented passed 5-0.

Mr. Ackermann – yes

Ms. Kirkman – yes

Mr. Ingalls – yes

Mr. Overbey – yes

Mr. Gibbons – yes

Mr. Levy – absent

Mr. Beauch – absent

July 22, 2008

Motion:

Mr. Overbey made a motion to adopt the July minutes as presented.

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Mr. Gibbons seconded the motion.

Vote:

The motion to approve the July 22, 2008 minutes as presented passed 4-0-1.

Mr. Ackermann – yes
Ms. Kirkman – yes
Mr. Ingalls – abstained
Mr. Overbey – yes
Mr. Gibbons – yes
Mr. Levy – absent
Mr. Beauch – absent

OTHER BUSINESS

Mr. Overbey stated it would be up to the Chairman to specify when the public hearing was opened and closed, to avoid any confusion. He stated there would need to be a determination, based on what the County Attorney determined, when the staff report was read would the public hearing be opened or would it be when the Chairman asked for the public comment.

Mr. Ackermann stated that was section 7-2 in the bylaws.

Ms. Kirkman stated that before the applicant steps forward the Chairman would need to state he was opening the public hearing, and after rebuttal state, he was closing the public hearing.

Ms. Hudson stated she was confused about the bylaws and the correction that needed to be made.

Mr. Ackermann stated the Board discussed the version he thought to be correct, which he sent to Mrs. Musante and would send a copy to Ms. Hudson.

Mr. Ackermann stated there was a letter going to the Circuit Court that stated the resignation of Mr. Michael Levy.

ADJOURNMENT

Motion:

Mr. Overbey made a motion to adjourn.

Ms. Kirkman seconded the motion.

With no further business to discuss, the meeting adjourned at 9:14 pm.

Ernest Ackermann, Chairman
Board of Zoning Appeals